United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1095

To be argued by
FREDERICK T. DAVIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1095

UNITED STATES OF AMERICA,
Appellee,

—v.—

FABIO CAPECE,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
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Preliminary Statement

Fabio Capece appeals from a judgment of conviction entered on November 21, 1975, in the United States District Court for the Southern District of New York after a six day trial before the Honorable Lawrence W. Pierce, United States District Judge, and a jury.

Indictment 73 Cr. 870, filed in one count on September 19, 1973, charged Fabio Capece and Salina Scarangela with conspiracy to distribute, and to possess with intent to distribute, narcotics in violation of Title 21, United States Code, Section 846.*

* On December 18, 1975, an order of *nolle prosequi* was filed as to Scarangela on this indictment.

Indictment 73 Cr. 164, filed on February 14, 1973, charged William Meinecke, John Doe, a/k/a "Peter Beck", (true name Michael Browne), and Mary Capece with the same facts involved in this indictment. Meinecke was convicted after trial in August, 1973, Michael Browne pled guilty to the indictment, and an order of *nolle prosequi* was filed as to Mary Capece.

The trial commenced on September 29, 1975, and ended on October 6, 1975, when the jury returned a verdict of guilty.

On November 21, 1975, Capece was sentenced to three years in prison to be followed by three years of special parole. Capece surrendered to the United States Marshal to begin serving his sentence on December 5, 1975.

On March 24, 1976, Capece filed a motion for reduction of sentence in the United States District Court. On March 31, 1976, this motion was dismissed for want to subject matter jurisdiction since a notice of appeal to this Court had been filed. See *United States* v. *Ellenbogen*, 390 F.2d 537 (2d Cir.), *cert. denied*, 393 U.S. 918 (1968). On May 12, 1976, Capece filed a further motion in the District Court for an order to stay of execution of the sentence and to be released and bail pending appeal. This motion was denied by the District Court by endorsement decision dated May 21, 1976.

Statement of Facts

The Government's Case

The principal Government witness was Michael Jefferds Browne, who had pleaded guilty to a separate indictment charging him with complicity in the facts underlying this indictment. Browne testified that during the summer of 1972, while living in California, he was approached by Salina Scarangela and Roberta Dilts who asked if he would be interested in participating in a narcotics transaction with them and a friend who was coming to California for that purpose. (Tr. 51). In August, 1972, he was summoned to the Scarangela house in Laguna Beach, California, and introduced to William Meinecke, Fabio Capece and Mary Capece. (Tr. 54).

Shortly thereafter, Browne moved into the Scarangela house, where the Capeces and Meinecke were staying. (Tr. 58). On several occasions in late August and early September, 1972, Capece and Meinecke left the house in search of marijuana, but were unsuccessful. (Tr. 59-61).

On September 5 and 6, 1972, Browne received telephone calls from Capece stating that he had found the marijuana and asking Browne to meet him and Meinecke at a certain restaurant in Ocean Beach, California. At the restaurant, Capece gave Browne approximately $100.00 to buy an additional suitcase to hold the marijuana. After Capece and Meinecke went off to retrieve and pack the marijuana in a rented car, Browne drove the car containing three suitcases of marijuana * to the San Diego railroad station, with Capece and Meinecke following in another vehicle. (Tr. 61-67).

With some difficulty, Browne loaded the suitcases onto the receiving platform, purchased a ticket to New York under the name of Peter Beck, and checked the luggage through to New York. He then left the railroad station and rejoined Capece and Meinecke, who shortly thereafter gave him approximately $200.00 for his efforts and received from him the baggage claim stubs. Later, he proceeded with Capece and Meinecke to the car rental station in Santa Ana, California, and the car was returned. That evening, Browne drove Meinecke and Capece to the Los Angeles airport, where they parted company.

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* In actuality, a footlocker containing additional marijuana was also loaded in the car and was subsequently sent to New York. The Drug Enforcement Administration agents who later seized the marijuana neglected to include the footlocker in the search warrant. For this reason, the footlocker was suppressed as evidence in the trial against Meinecke in 1973. In this case, the Government conceded the suppression of the footlocker, and instructed its witnesses not to avert to it. (Tr. 2-3).

Browne identified as Government Exhibits 1A, 1B and 1C the three suitcases he had carried into the railroad station, and also identified the baggage claim tickets he had received at the railroad station and given to Capece. (Tr. 68-73).

Nine other Government witnesses testified about their observations of certain of the events related by Browne. Roberta Dilts, a friend of Capece, acknowledged that she lived in California with Miss Scarangela in August, 1972, and that Meinecke and Capece visited them at a time when Michael Browne was living in the house. She denied knowing anything about any narcotics transaction, but also stated that she was under the influence of a heroin addiction at that time and had only a hazy recollection of events during that period. (Tr. 33-39).

Donald Dunbar, who was the general supervisor of San Diego railroad station in 1972, testified that on September 6, 1972, he saw Michael Browne carry three heavy suitcases into the railroad station and check them under the name of Peter Beck. Mr. Dunbar identified as Government Exhibits 4 and 5 the ticket reservation form and the baggage manifest reflecting these events. He further testified that on the suspicion the suitcases left by Browne contained narcotics, he called local agents of the Drug Enforcement Administration. Later that afternoon he turned over the suitcases to Agent McCravy of the Drug Enforcement Administration. (Tr. 147-62).

Nicholas Gountanis, the owner of Autorent Systems, a car rental business in Santa Ana, California, testified that in August, 1972, a woman named Mary Capece rented a car from him. He identified Exhibit 6 as the rental agreement reflecting this transaction, and explained certain entries on the form showing that the car was rented on August 16, 1972, and was returned on September 6, 1972. He also stated that Mrs. Capece had

rented another car earlier in the summer of 1972, and on that occasion she was accompanied by a man, whom Gountanis believed to be her husband, who explained that he could not rent the car because he did not have a license. (Tr. 169-80).

Agents Ed McCravy and Patrick Gregory of the Drug Enforcement Administration each testified concerning their activities on September 6, 1972. In response to a telephone call from Mr. Dunbar, McCravy went to the train station and examined the three suitcases pointed out by Dunbar. On the basis of his observations, Agent Gregory procured a search warrant for the suitcases and brought them to the Drug Enforcement Administration office. Later that evening, McGravy opened the suitcases and found 76 kilogram bricks of marijuana. He replaced one brick in each of the suitcases, and returned the suitcases to the custody of the railroad to be sent to New York. Of the remaining bricks, McCravy sent 24 to the Drug Administration Narcotics Laboratory for analysis, and destroyed the rest. (Tr. 190-216, 234-237).

Agents Michael Peterson and Thomas Smith testified that on September 10, 1972, they observed the three suitcases sent from California as they arrived by train at Pennsylvania Station in Manhattan. Several hours later, William Meinecke presented the claim checks for the suitcases to a railroad clerk, gathered up the suitcases and began to leave the railroad station. At that time he was arrested. The agents seized the three suitcases, still containing the three bricks of marijuana, and also seized from Meinecke an address book and several scraps of paper that were in his possession, all of which were admitted into evidence. The address book contained, *inter alia*, the address for Mary Capece. The scraps of paper contains notations referring to a trip to Los Angeles and to certain sums of money. (Tr. 248-58, 277-96).

Finally, Robert Countryman and Dennis Walczewski, each of whom were forensic chemists for the Drug Enforcement Administration in 1972, testified concerning their analysis of the narcotics involved in this case. Countryman examined the 24 bricks of marijuana retained by McCravy in California and Walczewski examined the three bricks that arrived in New York City on September 10, 1972. Each of them concluded that the bricks consisted of marijuana. (Tr. 304-13, 317-23).

The Defense Case

Fabio Capece called two witnesses on his behalf. Agent McCravy was recalled and was asked several questions about his conduct of the investigation after September 6, 1972. (Tr. 329-37). Roberta Dilts restated her recollection of the events she saw in August, 1972, and testified that while she heard Michael Browne discuss marijuana, she never discussed narcotics with Capece or Meinecke. She also testified that Michael Browne had a bad reputation for truthfulness and honesty in her community in California. (Tr. 357-62).

ARGUMENT

POINT I

Inadmissible hearsay was not admitted against Capece

Capece claims that the District Court erred in admitting into evidence certain testimony and exhibits that Capece now claims are hearsay. In particular, he points to testimony by Michael Browne that some time prior to August, 1972, Roberta Dilts and Salina Scarangela came to him and said "they had a friend coming out to California in the near future and they asked me if I would

be interested in working for them." (Tr. 50). He also raises a similar claim with respect to an address book and scraps of paper found on the person of William Meinecke at the time of his arrest. These claims are without merit.

Initially, it should be noted that neither of the claimed "statements" are hearsay at all. With respect to the statement to Browne by Scarangela and Dilts, the words constituted an invitation to join in a criminal enterprise and thus were direct proof of the conspiracy charged against Capece.* Indeed, the quoted words themselves do not even name Capece or implicate him in any way. Only when put in the context of Browne's subsequent testimony of the details of his later narcotics transactions with Meinecke and Capece did the challenged testimony even relate to Capece at all. As such, the testimony clearly concerned "verbal acts" that constituted direct evidence of the conspiracy rather than hearsay. See *United States* v. *D'Amato*, 493 F.2d 359, 363 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974); *United States* v. *Wiley*, 519 F.2d 1348, 1350 (2d Cir. 1975). See generally 6 Wigmore, *Evidence* § 1772 (3d ed. 1940).

The non-hearsay character of the documents found on William Meinecke at the time of his arrest is particularly clear from the decisions of this Court. In *United States* v. *Ruiz*, 477 F.2d 918, 919 (2d Cir. 1973), this Court held that a slip of paper found on the person of an alleged co-conspirator at the time of his arrest that bore the defendant's nickname and a telephone number almost identical to the defendant's was admissible as non-hearsay evidence to show an inference of association between the defendant and the co-conspirator. See also *United States*

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* Capece never moved for a bill of particulars prior to trial to determine the identities of his alleged co-conspirators. (Tr. 53-54).

v. *Ellis*, 461 F.2d 962, 970 (2d Cir. 1972); *United States* v. *Gareile*, 438 F.2d 366, 368 (2d Cir. 1970).

Second, even assuming that either of the challenged "statements" could be considered hearsay, each of them was clearly uttered in furtherance of a conspiratorial relationship with the defendant and thus was admissible as an admission of a co-conspirator. F.R. Evid. 801 (d)(2)(E). Browne testified that he accepted the invitation of Scarangela and Dilts and moved into their house, and described in detail the progress of the narcotics discussions and transactions that culminated in the 76 kilograms of marijuana being sent from California to New York. In particular, he stated that Roberta Dilts was "affiliated" with the transaction, and provided the introduction to Capece. (Tr. 111). Browne's testimony provided direct evidence of Capece's participation in the conspiratorial relationship that was far more than the fair preponderance of evidence required in this Circuit by *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1024 (1970). See also *United States* v. *Glazer*, Dkt. No. 75-1213, slip op. 2201, 2209-10 (2d Cir., March 1, 1976); *United States* v. *Wiley*, *supra*.

Capece attempts to avoid the obvious force of this by claiming that since the conspiracy culminated in the events of September 6, 1972, statements made prior to that time were not "in furtherance" of the conspiracy. This claim misses the point of the co-conspirator exception to the hearsay rule, since the exception focuses not on the crime of conspiracy as may be charged in an indictment, but on the relationship between the defendant and the extra-judicial declarant. As this Court has noted,

> The notion that the competency of the declarations of a confederate is confined to prosecutions for conspiracy has not the slightest basis; their admis-

> sion does not depend upon the indictment, but is merely an incident of the general principle of agency that the acts of any agent, within the scope of his authority, are competent against his principal.

United States v. *Olweiss*, 138 F.2d 798, 800 (2d Cir. 1943), *cert. denied*, 321 U.S. 744 (1944); see also *United States* v. *Marchisio*, 344 F.2d 653, 666-67 (2d Cir. 1965); *United States* v. *Rinaldi*, 393 F.2d 97, 99 (2d Cir.), *cert. denied*, 393 U.S. 913 (1968). Furthermore, the drafters of the Federal Rules of Evidence explicitly noted their intention to "carry forward [this] universally accepted doctrine" into Rule 801(d)(2)(E), see S. Rep. No. 93-1277, 93d Cong., 2d Sess. 26 (1974).

Since the evidence that the activities of Dilts, Scarangela and Meineicke were on behalf of a venture with which Capece joined was not only direct but overwhelmnig, it follows that the statements, even if considered hearsay, were admissible.

Finally, and particularly with respect to the statement of Dilts and Scarangela, even if technical error was committed—and the Government strongly submits that it was not—the admission of the testimony did not prejudice Capece. As noted above, the Dilts-Scarangela statement consisted of a single sentence and did not even mention Capece, but only stated that a "friend" wanted someone to "work" for them. The jury could not have been influenced by the statement unless it believed Browne's subsequent testimony that the "friend" was Capece, and that Capece, together with Meinicke and Browne, consummated the marijuana transaction together. Furthermore, Dilts was herself called as a witness by both the Government and the defense * and was fully available

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* Dilts was clearly a witness who was friendly to the defense, since she admitted that she liked Capece, associated with him during the course of the trial, and would rather see him acquitted than convicted. (Tr. 353).

for cross-examination about the statement. It follows that absolutely no prejudice to Capece flowed from the admission of the statement.

POINT II

The District Court did not limit the presentation of relevant proof by the defendant

Capece claims that the District Court unfairly restricted his presentation of proof in his own defense. This claim rests not only on a misconstruction of the law, but also on selective citations from the record that totally misconstrue the conduct of the trial.

Prior to the commencement of the trial the prosecutor requested a ruling that defense counsel could not use for impeachment purposes prior narcotics activities by Michael Browne that did not result in a conviction. The District Court so ruled, and, indeed, the ruling was in no way opposed by counsel for Capece. (Tr. 11). Nonetheless, during the testimony of Roberta Dilts counsel for Capece specifically asked whether she had engaged in any narcotics transactions with Browne—in flat contradiction of the judge's ruling, which was specifically brought to counsel's attention immediately before he asked the question. (Tr. 43-45). The District Court again ruled that such questions were not proper impeachment, even though Dilts indicated in the presence of the jury that she had, in fact, dealt in narcotics with Browne.

Subsequently, during the direct examination of Michael Browne, Browne admitted that in prior grand and petit jury appearances he had lied under oath when he stated that it was Scarangela alone who introduced him to the conspiracy. (Tr. 86). On cross-examination, he stated that the reason he had lied was to keep Roberta Dilts from being involved. (Tr. 110-111).

At the close of the Government's case, counsel for Capece offered to introduce testimony that Browne had engaged in narcotics transactions with Roberta Dilts. The sole ground for this offer of proof was that such testimony would impeach Browne's credibility (Tr. 349). This offer was rejected by the District Court on the ground that the inquiry would unnecessarily involve the trial in collateral matters, and was, in any event, improper impeachment.

When viewed in this proper factual perspective, Capece's present claims dissolve. First, Capece claims that the District Court unfairly limited his ability to impeach Browne. As the record shows, however, the impeachment value of the material Capece wished to adduce was extremely limited and was so loaded with collateral consequences that the Court was amply justified in excluding it. The sole specific statement by Browne that Capece wished to impeach was Browne's testimony that the reason he did not mention Dilts in his *prior* testimony was to protect her.* The District Court properly concluded that this was not only improper impeachment but would "be going into areas that would take us far afield from what we are concerned with here, even if it is considered as even remotely bearing or for that matter, even closely bearing on what it is you seek to show." (Tr. 353). The statement of Browne now claimed by Capece to be false did not concern Capece or his involvement with narcotics, nor even the accuracy of any factual statement of Browne about the conspiracy. Rather, Capece simply claims that the reason Browne gave for why, on another occasion,

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*Capece claims that "it was the Government that opened the door to the alleged reasons for Browne's false testimony before the Grand Jury..." Brief at 19. However, the record is clear that Browne's testimony of the reasons for his prior statement was brought out for the first time on cross-examination by Capece. (Tr. 110).

he testified falsely about the involvement of another person was incorrect. This had no bearing on the case, and the District Court judge acted properly within his discretion in excluding it, particularly in view of the lengthy and repetitive cross-examination of Browne himself. See *United States* v. *Pacelli*, 521 F.2d 135, 137 (2d Cir. 19[illegible]); *United States* v. *Green*, 523 F.2d 229, 237 (2d Cir.), *cert. denied*, —U.S.— 44 U.S.L.W. 3358 (Dec. 16, 1975); *United States* v. *Kahn*, 472 F.2d 272, 279, 281 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973); *United States* v. *Mahler*, 363 F.2d 673, 676-78 (2d Cir. 1966); see generally Federal Rule of Evidence 403; *Hamling* v. *United States*, 418 U.S. 87, 125, 127 (1974).

Second, Capece asserts that it was "the strategy of the defense to show that Michael Browne had arranged to send the marijuana on his own account and that appellant was not involved in the conspiracy." (Brief at 18). There is simply no basis in the record for this statement: at no time did counsel for Capece ever make such an offer of proof or claim to the District Court during discussion on any of the evidentiary rulings. In any event, Browne's engagement in earlier narcotics activities was hardly probative of his role in this one. Particularly since Capece was given complete leeway to question Roberta Dilts about Browne's role in *this* conspiracy (Tr. 359-61), the claimed limitation of an ability to present a defense was non-existent.

POINT III

The Prosecutor's summation was entirely proper

Capece claims that certain statements in the prosecutor's summation deprived him of a fair trial. This claim rests solely upon a flagrant distortion of the record.

Capece's first assertion is that the prosecutor falsely stated that Browne had no motive to lie in this case. During the course of his summation, counsel for Mr. Capece stated on several occasions that Michael Browne testified only because he was "looking for a deal". (Tr. 389, 390). In particular, defense counsel pointed to the fact that "as a result of everything that Michael Browne has done in this case, Michael Browne received a sentence of probation. Did he get his deal?" (Tr. 389-90). The prosecutor's response to this was as follows:

> Now, defense counsel said, "Of course, he [Browne] is working off a deal with the Government." What he fails to point out, that Mr. Browne was sentenced by Judge Pierce some time ago and had served his sentence. He was given a sentence of two years probation and had served that time, told you he completely finished his probation term. So what possible motive does he have at this point. If he were telling anything other than what happened, why couldn't he simply just thumb his nose at the Government and walk off?
>
> Furthermore, Mr. London tells you, "You know he got a deal because he got probation."
>
> It wasn't the Government who sentenced him. It was Judge Pierce, and he sentenced Mr. Browne for whatever reasons he felt were appropriate. (Tr. 400-01).

The inanity of Capece's present claim is demonstrated by his failure to object to these statements at

trial, which not only shows the inoffensiveness of the remarks but also precludes review in this Court, see *United States* v. *Canniff*, 521 F.2d 565, 572 (2d Cir. 1975); *United States* v. *Perez*, 426 F.2d 1073, 1081 (2d Cir. 1970), *aff'd.*, 402 U.S. 146 (1971); *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966); *United States* v. *Ballou*, 348 F.2d 467 (2d Cir. 1965); *United States* v. *Sten*, 342 F.2d 491, 493 (2d Cir. 1965). Furthermore his claim that the jury was not told that Browne could be prosecuted for perjury as the *only* manner in which the prosecutor's statement was false shows the shallowness of his present claim. Browne's liability for perjury hardly impeached him, and at any rate Capece's assertion should have been made, if at all, to the jury.

Capece's second claim is that prosecutor "argued that witnesses other than Browne had inculpated appellant." Brief at 21. Capece further states that the prosecutor "did not identify the other witnesse for the simple reasons that there were none." This contention is fatuous. The prosecutor at no time suggested that there were any potential witnesses against Capece other than those who testified at trial. Indeed, in the very passage following the remarks to which Capece now makes reference (53a), to which absolutely no objection was made, the prosecutor went over each of the facts presented by witnesses other than Michael Browne. (Tr. 405).*

Capece also points out that, prior to resting at the completion of the Government's case, the prosecutor reported to the Court the fact that William Meinecke had stated he would testify in a manner exculpatory of the defendant. This event, of course, which was conducted outside the presence of the jury, is utterly irrelevant to

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* Earlier in the summation, the prosecutor noted the source from among the witnesses at trial for each of the facts on which he relied. (Tr. 394-400).

the issue of misconduct during the summation, during which no comment by either side was made of Meinecke's possible testimony. Particularly in view of the Government's obligation under *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), to make potentially exculpatory evidence available to the defense, the prosecutor's action in describing Meinecke's statement was entirely proper.*

This Court has held on numerous occasions that a prosecutor in summation is not limited to being a mere automaton in reviewing the facts but may, within "broad limits", *United States* v. *Gerry*, 515 F.2d 130, 144 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States* v. *Dibrizzi*, 393 F.2d 642, 646 (2d Cir. 1968), urge the jury to draw inferences as well. *See, e.g., United States* v. *Wilner*, 523 F.2d 68, 73 (2d Cir. 1975); *United States* v. *White*, 486 F.2d 204, 207 (2d Cir. 1973), *cert. denied*, 415 U.S. 980 (1974). The prosecution in this case did no more than draw proper inferences from the facts in the record, to which no objection was made. Capece's assertions to the contrary represent a hollow attempt to create an issue where none exists.

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* The report of Meinecke's prospective testimony was required for another reason as well. Prior to the commencement of trial, the trial date had been on several occasions postponed so that the Government could use Meinecke as a witness, and, indeed, the Government had sought the disqualification of Capece's prior attorney on the ground that that attorney represented Meinecke as well. In view of this prior history, the report to the Court of why Meinecke was *not* called as a witness was necessary.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

FREDERICK T. DAVIS,
Assistant United States Attorney,
Of Counsel.

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Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

FREDERICK T. DAVIS being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 21st day of June, 1976 he served a copy of the within by placing the same in a properly postpaid franked envelope addressed:

Ronald Rubenstein, Esq.
125-10 Queens Blvd.
Kew Gardens, N. Y. 11415

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Frederick T. Davis

FREDERICK T. DAVIS
Assistant United States Attorney

Sworn to before me this

21st day of June, 1976.

Mary L. Avent

MARY L. AVENT
Notary Public, State of New York
No. 31-4600250
Qualified in Nassau County
Cert. Filed in Nassau County
Commission Expires March 30, 1977